Supreme Court, U.S.
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No. 98-79

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1998

KRISTOPHER SELLERS, by his
parents Alan and Sherri Sellers
and ALAN and SHERRI SELLERS,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF MANASSAS,
VIRGINIA and
JAMES E. UPPERMAN, SUPERINTENDENT OF THE
SCHOOL BOARD OF THE CITY OF MANASSAS,
VIRGINIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether monetary damages are available under the IDEA for the alleged failure to identify a student as disabled in his earlier school years.

2. Whether monetary damages are available under Section 504 of the Rehabilitation Act of 1973 for the alleged failure to identify a student as disabled in the absence of allegations of bad faith, fraud or intentional misconduct.

3. Whether a plaintiff may sue under Section 1983 for an alleged IDEA violation even though the IDEA has a comprehensive remedial scheme for violations of its own requirements and in the absence of clear statutory authority allowing such lawsuits.

4. Whether the plaintiff failed to plead the necessary elements of a Section 1983 cause of action.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CITATIONS iv

STATEMENT OF THE CASE 2

A. Procedural History 2
B. Factual Background 5

REASONS FOR DENYING THE WRIT 8

A. COMPENSATORY AND PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER THE IDEA. 8

B. NO CLAIM HAS BEEN STATED UNDER THE REHABILITATION ACT OF 1973 14

C. THE FOURTH CIRCUIT CORRECTLY HELD THAT THE SELLERS CANNOT SUE UNDER SECTION 1983 FOR ALLEGED IDEA VIOLATIONS. 19

1. The Statutory Language and Legislative History Do Not Permit Section 1983 Claims Based on IDEA Violations 19

2. Congress Has Not Unambiguously Prohibited Section 1983 Claims for Alleged IDEA Violations, as Required by the Spending Power 21

D. THE SELLERS HAVE NOT STATED A CLAIM UNDER SECTION 1983 . . . 24

CONCLUSION 25

TABLE OF CITATIONS

PAGE

Cases

Alexander v. Choate, 469 U.S. 287 (1985) 15, 17

Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589 (4th Cir. 1997) 23

Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981) 12

Barnett v. Fairfax County Sch. Bd., et al., 721 F. Supp. 755 (E.D. Va. 1989), aff'd, 927 F.2d 146 (4th Cir. 1994) 11, 16

Board of Educ. v. Rowley, 458 U.S. 177 (1982) 21

Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) 15

Bryan County Comm'r v. Brown, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) . 24, 25

Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359 (1985) 9, 10

Charles F. v. Board of Educ. of Skokie Sch. Dist. 68, 98 F.3d 989 (7th Cir. 1996) . . . 9, 12, 23

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981) 25

Colin K. v. Schmidt, 715 F.2d 1
(1st Cir. 1983) 11, 16, 17

Commonwealth of Virginia Dep't of Educ. v.
Riley, 106 F.3d 559 (4th Cir. 1997)
(en banc) 21-23

Crocker v. Tennessee Secondary Sch. Athletic
Ass'n, 980 F.2d 382 (6th Cir. 1992) 12, 23

Ezratty v. Commonwealth of Puerto Rico,
648 F.2d 770 (1st Cir. 1981) 11

Florence County Sch. Dist. Four v. Carter,
510 U.S. 7 (1993) 9, 10

Franklin v. Gwinnett County Pub. Schs.,
503 U.S. 60 (1990) 10, 11

Grzan v. Charter Hosp. of Northwest Ind.,
104 F.3d 116 (7th Cir. 1997) 14, 16

Hall v. Vance County Bd. of Educ.,
774 F.2d 629 (4th Cir. 1985) 11

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 25

Heidemann v. Rother, 84 F.3d 1021
(8th Cir. 1996) 13, 18, 23

Hoekstra v. Independent Sch. Dist., No. 283, 103 F.3d 624 (8th Cir. 1996), cert. denied, 117 S. Ct. 1852 (1997) 17

Johnson v. Thompson, 971 F.2d 1487 (10th Cir. 1992), cert. denied, 507 U.S. 910 (1993) 14, 16

Kelly v. Boeing Petroleum Servs., 61 F.3d 350 (5th Cir. 1995) 17

Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577 (D.C. Cir. 1984) 14

Manecke v. School Bd. of Pinellas County, 762 F.2d 912 (11th Cir. 1985), cert. denied, 474 U.S. 1062 (1986) 13

Marvin H. v. Austin Ind. Sch. Dist., 714 F.2d 1348 (5th Cir. 1983) 12, 17

Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982) 13, 14

Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658 (1978) 24

Moreno v. Consolidated Rail Corp., 99 F.3d 782 (6th Cir. 1995) 18

Pandazides v. Virginia Bd. of Educ., 13 F.3d 823 (4th Cir. 1994) 16

Pennhurst State Sch. v. Halderman,
451 U.S. 1 (1981) 22

Pesterfield v. Tennessee Valley Auth., 941 F.2d 437
(6th Cir. 1991) 17

Powell v. Defore, 699 F.2d 1078 (11th Cir. 1983) . . . 13

Praino v. Board of Educ. of Wappingers Cent.
Sch. Dist., 1997 U.S. App. LEXIS 8106
(2nd Cir.), cert. denied, 118 S. Ct. 222 (1997) . 11

Shevtsov v. Los Angeles Unified Sch. Dist.,
et al., 1998 U.S. App. LEXIS 949
(9th Cir. 1998) 13, 23

Smith v. Robinson, 468 U.S. 992 (1984) 15, 20

Southeastern Community College v. Davis,
442 U.S. 397 (1979) 15

Thompson v. Board of the Special Sch. Dist.
No. 1, et al., ___ F.3d ___, 1998 U.S.
App. LEXIS 9880 (8th Cir. 1998) 12, 17

Timms v. Metropolitan Sch. Dist. of Wabash
County, Ind., 722 F.2d 1310
(7th Cir. 1983) 17

Todd v. Elkins Sch. Dist. 10, 1997 U.S. App. LEXIS
358 (8th Cir. 1997) 13

Tuck v. HCA Health Servs. of Tenn., Inc., 842 F. Supp. 988 (M.D. Tenn. 1992), aff'd, 7 F.3d 465 (6th Cir. 1993), reh'g en banc denied, 1993 U.S. App. LEXIS 25164 (Nov. 19, 1993) 17

United States Dep't of Transp. v. Paralyzed Veterans of America, 477 U.S. 597 (1986) 14

United States v. University Hosp., State Univ. of N.Y. at Stony Brook, 729 F.2d 144 (2d Cir. 1984) 16

W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995) . 9, 13, 15, 16, 23

Wood v. President and Trustees of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992) 18

Statutes

20 U.S.C. § 1415 . . . . . 10, 20, 23, 24

42 U.S.C. § 1983 . . . . . i, 3, 4, 8, 13, 19-21, 23-25

42 U.S.C. § 1985 3

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA") . . . i-5, 7-14, 16, 18-24

§ 504 of the Rehabilitation Act of 1973 . . i, 3, 4, 8, 14-20

Constitutions

U.S. Const. amend. XIV 3

Other Authorities

Federal Rule of Civil Procedure 12(B)(6) 3

Sup. Ct. R. 12.7 7

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, School Board of the City of Manassas, Virginia, and James E. Upperman, Superintendent, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners in this case.

STATEMENT OF THE CASE

A. Procedural History

The U.S. Court of Appeals for the Fourth Circuit, on April 13, 1998, ruled in favor of the School Board of the City of Manassas, Virginia, and James E. Upperman, Superintendent (collectively referred to an "Respondents"). Petitioners' Appendix at p. 1 (hereafter "A__"). This decision affirmed the district court's decision of April 30, 1997.

This case began with administrative proceedings conducted under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA"). In these proceedings, the Sellers sought monetary damages in the form of compensatory and punitive damages to compensate them based on their allegation that Kristopher Sellers ("Kris") received only regular education services rather than special education services for a number of years. A48. The administrative proceedings did not address any educational issues as the Sellers conceded that they had resolved all educational disputes. They sought only compensatory and punitive damages. A43, A47-49. A decision was entered by the local hearing officer in favor of the school division on June 3, 1996. A46. The local hearing officer found that he had no authority to award monetary damages. A48. An appeal ensued to the state level and the state review hearing officer affirmed the decision of the local hearing officer on October 10, 1996. A43.

When both hearing officers found that they had no authority to award these damages, the Sellers initiated this action in federal court.[1] The complaint was filed by the Sellers individually and on behalf of Kris on November 12, 1996. The complaint alleged violations of the IDEA, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), 42 U.S.C. Sections 1983 and 1985, the Fourteenth Amendment and Virginia law. A26. On December 10, 1996, the defendants, the School Board of the City of Manassas, Virginia and James E. Upperman, Superintendent, filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(B)(6) for failure to state a claim on which relief could be granted. After allowing time for the parties to file initial and supplemental briefs, the District Court on April 30, 1997, granted the motion to dismiss. A23. The district judge found that the Sellers' claim that Kris should have been identified as disabled earlier was in essence a claim for educational malpractice and should be dismissed. Id. This decision is reported at 960 F.Supp. 1006.

The Sellers noted their appeal to the Fourth Circuit on May 28, 1997.[2] The Court heard oral argument on

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[1] Although Kris sued by his parents, the complaint alleges that he is eighteen years of age. Thus, the suit should have been initiated in his own name. There has been no indication through this time that Kristopher wishes to continue prosecuting this suit.

[2] The only person to note an appeal to the Fourth Circuit was Kristopher Sellers. Thus, the Fourth Circuit

January 29, 1998, and ruled in Respondents' favor on April 13, 1998. The Fourth Circuit agreed with the district court that this was a claim for educational malpractice, and that neither compensatory nor punitive damages were available for alleged IDEA violations. A6. Second, the Fourth Circuit agreed with the district court that the Sellers had failed to state a claim under Section 504 because they had not alleged that the Respondents acted with bad faith or gross misjudgment. Instead, the allegations in the complaint amounted to, at best, a negligence claim. A12-13. Finally, the Fourth Circuit held that the a party may not sue under Section 1983 for an IDEA violation, because the IDEA provides a comprehensive remedial scheme for violations of its own requirements. The language of the IDEA and its legislative history do not unambiguously permit plaintiffs to sue under Section 1983 for IDEA violations. A14-21. The district court held that the Sellers had failed to state a claim under the IDEA or Section 504 and, as a result, the Sellers could not maintain a Section 1983 action for IDEA or Section 504 violations. A34-35. The Fourth Circuit's decision is published at 141 F.3d 524.

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lacked jurisdiction with respect to the claim of Sherri Sellers and Alan Sellers. See Thompson v. E.I. DuPont de Nemours & Co., 74 F.3d 530, 532 (4th Cir. 1996). For convenience and consistency with the briefs submitted in the district and appellate courts, Kristopher Sellers as petitioner shall be referred to as plural rather than singular.

B. Factual Background

The Sellers make a number of factual assertions throughout their brief which are nowhere to be found in the record. The Sellers did not include these "facts" in the complaint and these "facts" were not before the trial court for its consideration. The facts which form the basis of this case and as alleged by the Sellers in their complaint are few.

Kristopher Sellers is 18 years old, has been diagnosed as learning disabled and emotionally disturbed, and did not receive special education services prior to the 1995-96 school year. A4, A23-24. Beginning as early as his fourth grade year, Kris' test scores should have alerted the school division of the need to test, assess, evaluate and place him in a special education program. A4, A24. Instead, the school division initiated a truancy petition against Kris, which was dismissed by the Juvenile and Domestic Relations Court of Prince William County on March 29, 1996. A4. It is also implicit in the complaint that Kris began to receive special educational services that were acceptable to his parents.

In subsequent administrative proceedings under the IDEA, the Sellers unsuccessfully sought to recover compensatory and punitive damages based on these assertions. A4, A24-26. The Sellers appealed these adverse determinations to federal court where they were also unsuccessful. A5, A23. These facts constitute the sole basis for the Sellers' claims for compensatory and punitive damages. Considering these facts, the trial and appellate courts correctly

determined that the claim that Kris should have been identified as disabled earlier was nothing more than an educational malpractice claim and did not state a cause of action for compensatory or punitive damages.

Just as they did in their brief presented to the Fourth Circuit, the Sellers try to introduce a number of new facts which are nowhere to be found in the record.[3] The Sellers make these allegations throughout their brief to this Court. In actuality, the "factual" allegations in the brief far exceed the sparse facts set forth in the record and discussed above.[4] The "facts" which are not part of the record, but mentioned by the Sellers in their brief nonetheless, are highlighted in the following discussion so that they are not considered as part of the Sellers' petition.

Specifically, the Sellers allege that Mrs. Sellers made complaints to the school system from the first grade on that Kris needed special education services, but that

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[3] The Sellers had ample time to introduce additional facts into the record had they desired to do so. The parties had two opportunities to brief the case at the trial level. The Sellers could have introduced additional facts via affidavits or moved to amend their complaint during the four and one half months from the filing of the Motion to Dismiss on December 10, 1996, until the ruling by the trial court on April 30, 1997, but did not do so.

[4] It should also be pointed out that some of these so-called "facts" are inaccurate. Respondents do not attempt to respond to the accuracy of these "facts."

Respondents refused to perform the necessary evaluation. Sellers' Brief at p. 6, 14, 17-18, 24. According to the Sellers, Respondents told Mrs. Sellers that Kristopher did not need any services and took no steps to test or identify Kristopher until Mrs. Sellers sought the assistance of counsel. Id. at 6, 24. These "facts" are not in the record and contain no citation to the Appendix. The Sellers also make representations regarding the findings of their experts. Id. at 6. These "facts" were also not in evidence. The Sellers allege that they had Kristopher privately tested, another "fact" not in the record. Id. at 4, 17, 24.

The Sellers also allege a number of violations of their procedural rights. Id. at 11, 17. Once again, this assertion of procedural violations is not in the record and was not a part of any argument made to the trial court. Nor is there any basis for asserting that Kris was offered a "full-time, special education private school with related services to meet his educational needs." Id. at 5. Additionally, in their argument, the Sellers maintain that the school principal was in a position of authority who was well-aware of and participated in the Respondents' alleged IDEA violations. Id. at 22. This is not in the record and was previously argued.

These "facts," which are not supported by the record, should not be considered.[5] The Sellers must

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[5] "In any document filed with this Court, a party may cite or quote from the record." Sup. Ct. R. 12.7. There is no authority allowing the Sellers to cite or quote from any

proceed on the sparse facts which they have alleged in their complaint and which are part of the record.

REASONS FOR DENYING THE WRIT

The petition for certiorari in this matter involves, in essence, three issues decided by the Fourth Circuit. None of these issues warrants review by this Court. First, courts have uniformly held that the IDEA does not provide for compensatory or punitive damages. These conclusions are uniform and legally sound. Second, courts have uniformly held that certain elements must be pleaded and proved to successfully maintain a claim under Section 504. The Sellers failed to plead these minimally necessary elements. Third, the IDEA's statutory framework, clear language, and legislative history prohibit a Section 1983 claim for money damages based on alleged violations of the IDEA. The Fourth Circuit's decision was correct as to this point, especially where, as here, a party fails to plead the requisite elements of a Section 1983 claim. Each of these issues will be examined in detail below.

A. COMPENSATORY AND PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER THE IDEA.

No court has yet held that monetary damages are available for violations of the IDEA. In their attempt to convince this Court otherwise, the Sellers rely on and

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source not in the record or, for that matter, to ignore the record altogether.

misinterpret the decision in W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995).

The Matula Court determined to the contrary that "the relief sought by plaintiffs in this action [i.e., money damages] was unavailable in IDEA administrative proceedings." Id. at 496. Thus, the Sellers' reliance on Matula is misplaced, because the Matula Court specifically held that money damages are not permitted under the IDEA. The Seventh Circuit shares in this interpretation of Matula. See Charles F. v. Board of Educ. of Skokie Sch. Dist. 68, 98 F.3d 989, 991 (7th Cir. 1996) (citing Matula, 67 F.3d at 496).

The IDEA does not expressly authorize monetary damages as a remedy for violations of its provisions. This Court, in determining what relief is available to prevailing parents under the IDEA, has twice stated that equitable remedies and equitable considerations are appropriate for determining the scope of relief available under the IDEA. See Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359, 374 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 16 (1993). In both of these cases, the Court authorized an award of tuition reimbursement to prevailing parents as an appropriate equitable remedy. Tuition reimbursement is characterized as equitable relief because it compensates the parents for services they provided and paid for and for which the school division was liable and failed to provide. Id. In neither case was the remedy of monetary damages approved as an available remedy under the IDEA.

Equitable relief such as tuition reimbursement is authorized under the IDEA via a court's authority to ". . . grant such relief as the court determines is appropriate." Id.; 20 U.S.C. § 1415(I)(2)(B)(iii).[6] Nowhere in these cases or in the language of the IDEA itself is there approval for the granting of monetary damages. This award would be inconsistent with the directive ". . . that the relief is to be 'appropriate' in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with 'a free appropriate public education . . . .'" Burlington Sch. Comm. v. Board of Educ., supra at 369. An award of monetary damages to one disabled student would limit the availability of funds for other disabled students and limit access to educational services for the very class of students that the law is designed to protect. Thus, the only approved relief under the IDEA is equitable relief, such as tuition reimbursement.

Although the Sellers cite Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1990) as permitting all available relief, including damages, Sellers' Brief at p. 9, this argument is faulty. It ignores the fact that this Court has twice interpreted the IDEA as permitting only equitable relief and that the Carter decision was rendered after Gwinnett. The argument also ignores the fact that with the

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[6] The IDEA was reauthorized by Congress last year and became effective on June 4, 1997. References will be made to the latest provisions of the IDEA. The provisions at issue in this case are unaffected by the reauthorization. A6.

reauthorization of the IDEA last year, Congress did not expand the scope of available relief under the IDEA to include damages. Thus, this argument is meritless. See Gwinnett, 503 U.S. at 73.

The various circuits that have considered the availability of damages under the IDEA have consistently found that there is no basis to award monetary damages. This position has been taken by the First Circuit. See e.g., Ezratty v. Commonwealth of Puerto Rico, 648 F.2d 770, 777 (1st Cir. 1981) (Failure to offer a timely evaluation would not give rise to a claim for damages.); Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983) (Parents are not entitled to compensatory and punitive damages for the school district's failure to provide an appropriate education.). The Second Circuit addressed this issue in the case of Praino v. Board of Educ. of Wappingers Cent. Sch. Dist., 1997 U.S. App. LEXIS 8106, at *4 (2nd Cir.), cert. denied, 118 S. Ct. 222 (1997) and denied monetary damages.

The Fourth Circuit has not only denied monetary damages in IDEA cases, but also held that there is no private cause of action for damages for educational malpractice under the IDEA. See Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633, n. 3 (4th Cir. 1985)("The Act permits a reimbursement remedy, but does not create a private cause of action for damages for educational malpractice."). See also, Barnett v. Fairfax County Sch. Bd., et al., 721 F. Supp. 755, 756 (E.D. Va. 1989) ("[I]t has been clearly established that aside from reimbursement to parents for private tuition, compensatory damages are not

recoverable under [the IDEA]."), aff'd, 927 F.2d 146 (4th Cir. 1994).

Likewise, the Fifth Circuit has refused to allow a claim for compensatory or punitive damages under the IDEA. See Marvin H. v. Austin Ind. Sch. Dist., 714 F.2d 1348, 1356 (5th Cir. 1983) ("[W]e join the Seventh, Eighth and Eleventh Circuits . . . in finding that . . . a damage remedy is not generally consistent with the goals of the statute."). This same position has been affirmed by the Sixth Circuit in the case Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382, 386 (6th Cir. 1992) ("In this case, general damages for emotional anguish . . . do not constitute 'appropriate' judicial relief.").

The Seventh Circuit has also affirmed the unavailability of monetary damages in its decisions. See e.g., Charlie F. v. Board of Educ. of Skokie Sch. Dist. 68, 98 F.3d 989, 991 (7th Cir. 1996) (Disabled student who sought monetary damages from teacher, school principal, and school district superintendent with respect to allegedly misconceived educational strategy was not entitled to damages.); Anderson v. Thompson, 658 F.2d 1205, 1213 (7th Cir. 1981) ("When a school district makes a good faith effort to provide a child with an appropriate education, we do not believe that as a general rule it is good policy to require that a school district pay money damages if it later turns out that a different programming decision should have been made.")

Similar opinions have been given on multiple occasions by the Eighth Circuit. See Thompson v. Board of

the Special Sch. Dist. No. 1, et al., ___ F.3d ___, 1998 U.S. App. LEXIS 9880, at *13 (8th Cir. 1998) ("[A] claim 'based upon defendants' alleged violations of the IDEA may not be pursued in this . . . action because general and punitive damages . . . are not available under IDEA.'") (quoting Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996) (Pain and suffering, emotional distress, and loss of academic opportunities will not give rise to a claim for monetary damages under the IDEA.)); Todd v. Elkins Sch. Dist. 10, 1997 U.S. App. LEXIS 358 (8th Cir. 1997) (Student who fell from unbuckled wheelchair and broke his leg was not entitled to seek monetary damages under the IDEA.); and Monahan v. Nebraska, 687 F.2d 1164, 1169 (8th Cir. 1982) (Damages are not available under the IDEA for an improper placement.).

Finally, the Ninth and Eleventh Circuits have denied monetary damages in IDEA actions. See Shevtsov v. Los Angeles Unified Sch. Dist., et al., 1998 U.S. App. LEXIS 949, at *5-6 (9th Cir. 1998) ("There is no authority for the imposition of [punitive damages and damages for pain and suffering] under the IDEA or, derivatively, under 42 U.S.C. § 1983."); and in the Eleventh Circuit, Manecke v. School Bd. of Pinellas County, 762 F.2d 912, 916 n.2 (11th Cir. 1985), cert. denied, 474 U.S. 1062 (1986)("tort-type damages" unavailable); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983) (Damages are not available under the IDEA for violations of special education laws.).

The Sellers have misinterpreted Matula and cannot cite to any circuit authorizing monetary damages for alleged

IDEA violations. As a result, the Sellers' petition should be denied.

B. NO CLAIM HAS BEEN STATED UNDER THE REHABILITATION ACT OF 1973.

The Sellers cannot avoid the fact that they failed to make out a claim for damages under Section 504. They needed to allege that the Respondents did something more than merely fail to provide a free, appropriate education as required by the IDEA. See, e.g., Monahan, supra at 1170; Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577, 1580 (D.C. Cir. 1984). Specifically, they needed to allege that Kris is a person with a disability as defined by the Act, that he is otherwise qualified to participate in the benefit sought (school activity), that the Respondents received federal financial assistance, and that Kris was subject to discrimination solely on the basis of his disability. See, e.g., Johnson v. Thompson, 971 F.2d 1487, 1492 (10th Cir. 1992), cert. denied, 507 U.S. 910 (1993). The Sellers, however, failed to allege these basic elements. Kris did not allege that he was denied access to special education services solely because he had a disability or that the denial of services was made intentionally or in bad faith.[7]

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[7] Additionally, the Sellers cannot maintain a § 504 claim against defendant Upperman individually, because Upperman is not a recipient of federal funds. See, e.g., Grzan v. Charter Hosp. of Northwest Ind., 104 F.3d 116, 119-120 (7th Cir. 1997) (citing United States Dep't of

The Sellers' complaint alleged only that Kris is disabled, was not identified early enough and was not given access to special education services. The Sellers failed to allege the essential element that this denial of services was due solely to his disability, or that the Respondents engaged in any act which could possibly constitute bad faith or gross misjudgment.[8]

Despite failing to allege the essential elements of their claim, the Sellers rely on facts that are not in the record to draw a parallel between this case and Matula, supra. Sellers' Brief at 17-18. As stated earlier, the complaint did not include allegations of meetings between the parents and Respondents, requests for evaluations, or procedural violations. Yet, the Sellers rely on precisely

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Transp. v. Paralyzed Veterans of America, 477 U.S. 597, 605 (1986).

[8] Section 504 only calls for the "evenhanded treatment of qualified handicapped persons," not "affirmative efforts to overcome the disabilities caused by handicaps." Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979); see also Bowen v. American Hosp. Ass'n, 476 U.S. 610, 640-41 (1986); Alexander v. Choate, 469 U.S. 287, 304 (1985); Smith v. Robinson, 468 U.S. 992, 1018 (1984) ("[Section] 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons."). The Sellers fail to allege that the Respondents' treatment of Kris was due solely to his disability.

these facts when they compare this case to Matula. It is telling that the Sellers admit in their brief to this Court that the complaint "did not reveal in detail the factual bases for the procedural and substantive violations of IDEA and § 504." Id. at 14. The Sellers have not alleged the essential elements of a Section 504 claim, and they cannot now rely on facts outside the record to equate this case with Matula.

Additionally, the denial of access by a disabled student to an educational program set up for disabled students does not prove discrimination based on disability. The Sellers simply alleged that Kris may have been treated differently from other disabled students. However, Section 504 protects against "discriminatory treatment in favor of *non*-handicapped individuals." Grzan v. Charter Hosp. of Northwest Ind., 104 F.3d 116, 122 (7th Cir. 1997)(citing Johnson v. Thompson, supra at 1493)(emphasis added in Grzan). The alleged denial does not involve the denial of a benefit available to non-disabled students and, thus, does not state a claim for discrimination based on disability. See also Colin K. v. Schmidt, supra at 9; United States v. University Hosp., State Univ. of N.Y. at Stony Brook, 729 F.2d 144 (2d Cir. 1984).

Furthermore, in the context of education, in order to make out a claim for monetary damages, the Sellers must prove intentional discrimination. This has been made clear in the Fourth Circuit in Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 830, n. 9 (4th Cir. 1994), and Barnett v. Fairfax County Sch. Bd., supra at 756 ("Before damages can be sought for basic education claims such as those

under Section 504, there must be showing of bad faith or intentional discrimination."). The First Circuit in Colin K v. Schmidt, supra at 10, and the Fifth Circuit in Marvin H., supra at 1357, agree that intentional discrimination is required in a Section 504 claim.

The Sixth Circuit also requires discriminatory intent. Tuck v. HCA Health Servs. of Tenn., Inc., 842 F. Supp. 988 (M.D. Tenn. 1992), aff'd, 7 F.3d 465 (6th Cir. 1993), reh'g en banc denied, 1993 U.S. App. LEXIS 25164 (Nov. 19, 1993). Further, the Fifth and Sixth Circuits have distinguished the case of Alexander v. Choate, 469 U.S. 287 (1985) by holding that Alexander applies "only in regard to disparate impact cases." Pesterfield v. Tennessee Valley Auth., 941 F.2d 437, 443 n.2 (6th Cir. 1991); see also Kelly v. Boeing Petroleum Servs., 61 F.3d 350, 365 (5th Cir. 1995). The Alexander Court had determined that, in disparate impact cases, a plaintiff need not prove discriminatory intent for his Section 504 claim to proceed. Obviously, the Sellers' claim is not a disparate impact claim, and is therefore not governed by Alexander.

The Seventh, Eighth, and Eleventh Circuits also require a showing of intentional discrimination. See Timms v. Metropolitan Sch. Dist. of Wabash County, Ind., 722 F.2d 1310, 1318 n.4 (7th Cir. 1983) (recognized during discussion of exhaustion of remedies); in the Eighth Circuit in Thompson v. Board of the Special Sch. Dist. No. 1, et al., supra at *15 ("[I]n order to make out a prima facie case under . . . Section 504, [the plaintiff] must show bad faith or an exercise of gross misjudgment . . . .") (citing Hoekstra v. Independent Sch. Dist., No. 283, 103 F.3d

624, 626-27 (8th Cir. 1996), cert. denied, 117 S. Ct. 1852 (1997)); Heidemann v. Rother, supra at 1032 (Either gross misjudgment or bad faith should be shown before a Section 504 violation can be made out in the context of education.); and in the Eleventh Circuit, Wood v. President and Trustees of Spring Hill College, 978 F.2d 1214, 1219 (11th Cir. 1992).

In the instant case, the Sellers have alleged nothing more than a mere failure to evaluate and identify at an earlier date. The Fourth Circuit correctly held that these allegations amounted to nothing more than an alleged violation of the IDEA and, at best, a negligence claim. The Courts of Appeals are in unison that such allegations do not state a Section 504 claim.[9] As a result, the petition should be denied.

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[9] Furthermore, the Sellers seek punitive damages for the violations of Section 504 which they have alleged. It is not clear that punitive damages are available as a remedy under Section 504. See Moreno v. Consolidated Rail Corp., 99 F.3d 782 (6th Cir. 1995).

C. THE FOURTH CIRCUIT CORRECTLY HELD THAT THE SELLERS CANNOT SUE UNDER SECTION 1983 FOR ALLEGED IDEA VIOLATIONS.

1. The Statutory Language and Legislative History Do Not Permit Section 1983 Claims Based on IDEA Violations.

The IDEA's comprehensive remedial scheme for violations of its own requirements precludes the Sellers from bringing a Section 1983 based on alleged violations of the IDEA. The statutory language and the legislative history do not provide the necessary unambiguous language which would allow the Sellers to bypass the remedies provided in the IDEA.

The language of the IDEA in question is the following:

> Nothing in this part shall be construed to restrict or limit the rights, procedures and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities . . . .

20 U.S.C. § 1415(f).[10] The provision apples only to the listed statutes and to those other laws protecting the rights of disabled children. Section 1983 is not expressly mentioned and is not aimed at protecting the rights of disabled children. Thus, the IDEA itself does not authorize a suit under Section 1983.

Moreover, there is no legislative history to support the Sellers' view that Congress intended to allow for Section 1983 actions premised on IDEA violations. The House Reports cited by the Sellers indicate an intent to protect the rights of disabled children through the Constitution and the statutes mentioned in the above-quoted text. See Sellers' Brief at 20-23. The Fourth Circuit rightfully noted that these House Reports "naturally" mention Section 1983, because Section 1983 "supplies disabled children and their parents or guardians with a private right of action *for constitutional violations*." A18 (emphasis added). As a result, there is no evidence of Congressional intent to allow Section 1983 claims for alleged IDEA violations.

The Fourth Circuit's decision makes even more sense considering that this Court held, in Smith v.

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[10] The quoted language is from the 1986 amendments. This version added Constitutional and Rehabilitation Act claims as claims that may be brought regardless of the IDEA's remedial scheme. The 1997 reauthorization added claims brought under the Americans with Disabilities Act to the list. See 20 U.S.C. § 1415(l).

Robinson, 468 U.S. 992, 1020 (1984), that the omission of a damages provision in the IDEA was ". . . in response to Congress' awareness of the financial burden already imposed on States by the responsibility of providing education for handicapped children." Congress has not amended the law to expressly provide for a monetary damages remedy. The Sellers should not be allowed to do indirectly -- sue under Section 1983 to obtain money damages -- what they cannot do directly under the IDEA.

2. Congress Has Not Unambiguously Prohibited Section 1983 Claims for Alleged IDEA Violations, as Required by the Spending Power.

The IDEA is a joint federal-state program enacted under Congress' spending power. Commonwealth of Virginia Dep't of Educ. v. Riley, 106 F.3d 559, 561 (4th Cir. 1997) (en banc). Under the IDEA, a State receives federal money in exchange for its agreement to provide procedural protections and educational services to students with disabilities who are eligible to receive services. Board of Educ. v. Rowley, 458 U.S. 177, 179 (1982). Any enactment pursuant to the spending power is contractual in nature and must be expressed in an unambiguous manner.

> Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on

> whether the State voluntarily and knowingly accepts the terms of the "contract". There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, *if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously*.

See Pennhurst State Sch. v. Halderman, 451 U.S. 1, 17 (1981) (citations omitted) (emphasis added). The Fourth Circuit has applied this spending power analysis to the IDEA and held that

> language which, at best, only implicitly conditions the receipt of federal funding on the fulfillment of certain conditions is insufficient to impose on the state the condition sought.

Commonwealth of Virginia Dep't of Educ. v. Riley, supra at 561.[11]

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[11] In their brief, the Sellers unsuccessfully try to distinguish Riley. Sellers' Brief at 19. The Riley Court concluded that the federal government could not require Virginia to provide educational services to special education students who were suspended and expelled for misconduct which was not caused by their disability when this requirement was not expressed in the IDEA and was only arguably "implicit" in the law. Commonwealth of Virginia

The Fourth Circuit correctly held that § 1415(f) "fails to state, or even imply, that Section 1983 suits may be brought for IDEA violations. Instead, it pointedly omits 42 U.S.C. § 1983 from its list of statutes. This omission is significant." A20. Thus, there is no express contractual authority for acceptance by the School Board of Section 1983 liability.

The Sellers rely primarily on Matula, supra, for the proposition that the IDEA authorizes Section 1983 causes of action based on violations of the IDEA. This reliance is in error for two reasons. First, the Matula Court ignored the fact that Section 1983 is not mentioned in the IDEA's list of statutes. Second, the Matula Court discussed the legislative history as though it explicitly allows a Section 1983 action based on an alleged IDEA violation. Matula, supra at 494. The Sellers Court correctly pointed out that the legislative history does not explicitly approve such actions. Thus, the Matula Court's decision is in error.[12]

Dep't of Educ. v. Riley, supra at 561; see also, Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 603 n.8 (4th Cir. 1997).

[12] The majority of appellate courts deciding this issue has refused to allow Section 1983 suits based on alleged violations of the IDEA. See, e.g., Crocker v. Tennessee Secondary Sch., supra, at 387. Charles F. v. Board of Educ. of Skokie Sch. Dist., supra; Heidemann v. Rother, supra at 387. The most recent pronouncement came in an unpublished opinion rendered by the Ninth Circuit. See Shevtsov, supra at *5-6 ("There is no authority supporting

D. THE SELLERS HAVE NOT STATED A CLAIM UNDER SECTION 1983.

The Sellers have not alleged even the minimal elements for recovery under Section 1983. There is no allegation that any actions of either Respondent denied Kris' rights secured to him by statute. Specifically, there are no allegations in the complaint that either of the Respondents took any steps themselves to deny Kris access to a special education program. The IDEA provides that a team determines whether a student is identified as disabled. 20 U.S.C. § 1415(a)(4). The School Board and the Superintendent were not alleged to be a part of that team.

There are also no allegations that either the School Board or the Superintendent knew of the denial of special education services.[13] Respondeat superior theories do not apply in these situation. Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 689 (1978); Bryan County Comm'r v. Brown, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626, 639 (1997). Thus, neither Respondent has

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the imposition of [punitive damages and damages for pain and suffering] under the IDEA, or, derivatively, under 42 U.S.C. § 1983.").

[13] The Sellers' statements in their brief, p. 22, that the school principal was "aware of, and participated in, the school's violation of the IDEA," or that Kris' rights were denied by "actions by the school, with the knowledge and participation of those in positions of authority" are not in the record.

Section 1983 liability under the facts as alleged.[14] There is no showing that either was a moving force in taking the action to deny Kris special education services. Id.

CONCLUSION

For the reasons stated above, the School Board of the City of Manassas, Virginia, and James E. Upperman, Superintendent, request that the Petition for Writ of Certiorari be denied.

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[14] In any event, it would also appear that the Superintendent would be entitled to good faith immunity under the circumstances of this case. See Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982). Of course, the School Board is immune from punitive damages. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).